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Personal Liability Implications of the Duty to Warn Are Hard Pills to Swallow: From Tarasoff To Hutchinson v. Patel and Beyond

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COMMENTS

PERSONAL LIABILITY IMPLICATIONS OF THE DUTY TO WARN ARE HARD PILLS TO SWALLOW: FROM *TARASOFF* TO *HUTCHINSON v. PATEL* AND BEYOND

I. INTRODUCTION

Two decades have passed since the landmark case of *Tarasoff v. Regents of University of California*,[1] and much ambiguity remains in the law regarding therapist disclosure. Most courts and legislatures in the United States have accepted the California Supreme Court's decision in *Tarasoff* as a "foundation for establishing duties of reasonable care upon psychotherapists to . . . protect potential victims [from] their [dangerous] patients."[2] Unfortunately, statutes and case law have added to, rather than reduced, the concerns and uncertainties in this area of the law.[3]

In one of the most recent *Tarasoff* based decisions, *Hutchinson v. Patel*,[4] the Louisiana Supreme Court has effectively broadened third party tort recovery beyond amounts which patients can receive, exposing therapists to personal, not just professional, liability.[5] This decision alters the *Tarasoff* analysis by subdividing the liability for the duty to protect

1. 529 P.2d 553 (Cal. 1974)("*Tarasoff I*"), *modified*, 551 P.2d 334 (Cal. 1976)("*Tarasoff II*"). *See* discussion of both cases *infra* notes 10-43 and accompanying text.

2. Peter F. Lake, *Revisiting* Tarasoff, 58 ALB. L. REV. 97, 98 (1994)(discussing the deeper implications of the Tarasoff decision and concluding that the decision suggests an organized approach to tort remedies).

3. A commentator observed that "[o]ne reason for disenchantment with the judicial approach is the confusing, divergent trends, which collectively do not provide helpful guidance for the psychiatrist wishing to practice ethically and legally." Alan R. Felthous, M.D., *The Ever Confusing Jurisprudence of Psychotherapist's Duty to Protect*, 17 J. PSYCHIATRY & L. 575, 576 (1989).

4. 637 So. 2d 415 (La. 1994).

5. *Cf.* Penny Dowd Liuzza, Hutchinson v. Patel, *Louisiana Supreme Court's First Response to* Tarasoff *Duty to Warn: Broadens Recovery But Narrows Liability*, 40 LOY. L. REV. 1011, 1027 (1995)(concluding that the Louisiana Supreme Court holding broadens third party recovery and "potentially narrow[s] therapist's scope of liability . . . by restricting . . . claim[s]"). The decision does narrow the scope of *malpractice* liability, but exposes the therapist to a more unsettling *personal* liability.

into both an independent duty to predict, that is subject to malpractice liability,[6] and an independent duty to warn, which is not subject to malpractice liability.[7]

Excluding *Tarasoff* claims from coverage under medical malpractice acts will effectively deny therapists any insurance coverage whatsoever.[8] Applying the holding in *Hutchinson* to future cases ultimately could result in driving therapists from this area of practice or forcing them to increase their fees in order to cover the risk of personal liability. While malpractice insurance rates may not increase, medical mental health services may become more expensive. The Louisiana Supreme Court decision, based on ineffective legislation, will also diminish public safety by discouraging therapists from treating potentially dangerous, mentally ill patients.[9]

Although *Tarasoff*, a California case, is only persuasive authority in Louisiana and other jurisdictions outside California, its reasoning and the reasoning of other courts and legislatures dealing with the malpractice issue are more convincing than Louisiana's stance.

This Comment criticizes the decisions and statutes holding therapists personally liable for breaches of the duty to protect. Part II discusses the evolution of the *Tarasoff* doctrine by looking at both case law and statutory developments of the general duty to protect. Part III focuses on cases dealing with malpractice liability implications, and analyzes both sides of the issue. Part IV discusses another perspective of malpractice categorization; it indicates the need for consistency in the law, and suggests improvements in current statutes. This Comment concludes that current laws must be changed. Current malpractice statutes and duty to protect statutes need to reflect that the duty to protect consists of two inextricably woven subparts: the duty to predict dangerousness and the duty to protect the victim. A breach of the duty to protect third parties occurs in the context of provision of professional services, and thus, it

6. 637 So. 2d at 424.

7. *Id.*

8. *See id.* at 422-23 (stating the defendant's compelling argument).

9. For a similar argument made in the context of the duty itself, *see* Alan A. Stone, *The* Tarasoff *Decisions: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358, 373 (1976) (stating that although therapists do have a moral duty when third parties are endangered by their patients, "the duty . . . will reduce rather than increase public safety because it will diminish the ability and motivation of therapists to treat effectively mentally disturbed and potentially dangerous people"). The same result is likely to occur by making the duty to warn a personal liability trap for therapists.

should constitute malpractice. Therapists should not be held personally liable for what should be considered to be their professional negligence.

II. Background on the Therapists' Duty to Protect Third Parties from Their Dangerous Patients

A. The Development of A Duty to Warn Third Parties: The Tarasoff Cases

Tarasoff was the first case to find that therapists have a duty to warn third parties of possible harm by their patients.[10] In its first hearing of the case, the California Supreme Court held that the victim's parents had a cause of action against an outpatient's therapist for breach of the duty to warn after the violent patient murdered their daughter Tatiana.[11] Specifically, the court found that a therapist has a duty to warn when, "in the exercise of his professional skill and knowledge, [the therapist] determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient."[12]

Prosenjit Poddar murdered Tatiana Tarasoff in 1969, just two months after confiding this intention to a University of California psychologist.[13] The therapist notified the university's campus police at the time of the threat, and based on his request, they apprehended Poddar.[14] The campus police then released Poddar after deciding that he was rational and warning him to stay away from Tatiana.[15] Neither Tatiana nor her family were notified of the threats on her life,[16] and the therapist's supervisor ordered "that no further action be taken to deter Poddar."[17]

In an unusual grant of rehearing, the California Supreme Court vacated its prior *Tarasoff* decision, holding instead that "[w]hen a therapist determines, or pursuant to the standards of his profession should deter-

10. *See* Dianne S. Salter, Note, *The Duty to Warn Third Parties: A Retrospective on* Tarasoff, 18 Rutgers L.J. 145, 146 (1986) (examining the effects of the *Tarasoff* duty to warn on psychotherapists' ability to conform their practices to the "nebulous" requirements of the law).

11. Tarasoff v. Regents of Univ. of Cal., 529 P.2d 553, 565 (Cal. 1974)("*Tarasoff I*").

12. *Id.* at 555.

13. *Id.* at 554. The therapist felt that Poddar should be committed to an institution and notified the police of this fact by letter and by telephone. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 341 (Cal. 1976) ("*Tarasoff II*").

14. *Tarasoff I*, 529 P.2d at 554.

15. *Id.*

16. *Id.* at 555. In fact, Poddar had moved in with Tatiana's brother just prior to the murder. *Tarasoff II*, 551 P.2d at 341.

17. *Tarasoff I*, 529 P.2d at 554-55.

mine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[18] The court went on to state that the duty could be discharged in a number of ways, depending on the circumstances, including "warn[ing] the intended victim or others likely to appraise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances."[19]

1. Sources for the Duty

a. Common Law

The *Tarasoff II* court created an exception to the general rule under the common law, which states that a person does not have an affirmative duty to act to protect others even if action by a particular person is necessary to prevent harm.[20] Liability for nonfeasance has developed as a remedy when a prior special relationship is shown to exist between two parties.[21] There is a duty to control the actions of "a third person as to prevent him from causing physical harm to another [if] . . . a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct."[22] The special relationship exception to the general rule requires that the actor be able to, or have

18. *Tarasoff II*, 551 P.2d at 340 (replacing the *Tarasoff I* "duty to warn" with the much broader "duty to protect").

19. *Id.* The alteration of the *Tarasoff I* holding has created confusion among therapists who follow the rule of *Tarasoff I* which imposed only a duty to warn, not the broader duty to protect. Vikram S. Mangalmurti, *Psychotherapists' Fear of* Tarasoff: *All In the Mind?*, 22 J. PSYCHIATRY & L. 379, 395 (1994). Although the duty to protect "could involve warning the victim, such a response is not necessarily the only one available[, a] nuance often missed by the critics of the California court's ruling." *Id.* at 381. Another commentator pointed out that "the . . . reasonableness standard presents a trier of fact with the post facto guesswork of determining whether a duty existed to warn or take precautions." Michael R. Geske, Note, *Statutes Limiting Mental Health Professionals' Liability for the Violent Acts of Their Patients*, 64 IND. L.J. 391, 396 (1988). Courts in jurisdictions other than California also have witnessed this confusion. *See, e.g.*, Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193 (D. Neb. 1980) (stating that precautions other than a warning may be required under different circumstances).

20. RESTATEMENT (SECOND) OF TORTS § 314 (1965).

21. *Id.* § 314 cmt. c (1965). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 (5th ed. 1984) (stating that new duties emerge with changes in society and courts will find a new duty when "reasonable men would recognize it and agree that it exists").

22. RESTATEMENT (SECOND) OF TORTS § 314 (1965). For further discussion of the duties imposed through special relationships *see* KEETON ET AL., *supra* note 21, at 356-59; John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L.

the right to, control the third person's conduct.[23]

The court in *Tarasoff II* found that a special relation existed between the therapist and Poddar based on the patient-therapist relationship,[24] and that "[s]uch a relationship may support affirmative duties for the benefit of third persons."[25] The court decided that the situation before it was analogous to the situation in which a medical doctor diagnoses a patient with a communicable disease.[26] In those cases, courts have held that the doctor has a duty to warn any third parties who might be harmed through their exposure to the disease.[27]

In order for the duty to warn to arise, the harm must be foreseeable, and a special relationship must exist.[28] The court will declare a duty

> only upon the 'balancing of a number of considerations' . . . [including,] 'foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered,[29] the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing

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REV. 867, 870 (suggesting that the therapists should have a duty to act reasonably under the circumstances in duty to protect cases).

23. *See* RESTATEMENT (SECOND) OF TORTS §§ 316-19 (1965) (listing examples of special relationships). Section 319 relates to the control of dangerous third persons. All of the illustrations given describe patients in hospitals. There are no illustrations dealing with outpatients who are typical in a psychiatric practice. RESTATEMENT (SECOND) OF TORTS § 319 (1965).

24. *Tarasoff II*, 551 P.2d at 343.

25. The court's finding that a special relationship existed in this case was criticized because of the lack of control a therapist typically has over a patient in outpatient settings. Hasenei v. United States, 541 F. Supp. 999, 1009 (D. Md. 1982) (stating that if there is not the element of control over a patient, then there is no basis for a special relation exception to the tort law rule that bars a duty to act). *See also* Stone, *supra* note 9, at 366 (stating that "the therapist seeing a patient in a clinic or office has no control over the patient").

26. *Tarasoff II*, 551 P.2d at 344.

27. *See, e.g.*, Skillings v. Allen, 173 N.W. 663 (Minn. 1919)(holding a medical doctor liable for failing to warn a patient's parents of the contagious character of scarlet fever); Davis v. Redman, 227 S.W. 612, 613 (Ark. 1921)(holding a doctor liable for not warning the family of a patient that typhoid fever is contagious); Bradshaw v. Daniel, 854 S.W.2d 865, 866 (Tenn. 1993)(recognizing cause of action for the wife of a patient who had Rocky Mountain spotted fever because the doctor had a duty to warn her of the risk of exposure). *But see* Boynton v. Burglass, 590 So. 2d 446, 450-51 (Fla. Dist. Ct. App. 1991)(stating that the analogy between a therapist's duty to warn a third party of danger and a doctor having to warn of communicable diseases is inappropriate because the latter diagnosis can be verified and is therefore much more accurate than a diagnosis predicting dangerousness).

28. *Tarasoff II*, 551 P.2d at 342-43.

29. Referring to special relationships discussed *supra* notes 21-27 and accompanying text.

> a duty to exercise care with resulting liability for breach,[30] and the availability, cost and prevalence of insurance[31] for the risk involved.'[32]

The court identified foreseeability of harm as the most important factor in imposing the duty to warn.[33] The court acknowledged the fact that therapists have difficulty in foreseeing dangerousness in their patients.[34] One hundred percent accuracy in prediction is an unreasonable expectation; thus, the court determined that "the therapist need only exercise 'that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of [that professional specialty] under similar circumstances.'"[35] The court recognized that in this case, the harm was foreseeable because of the therapist's predictions.[36]

b. Public Policy

Although the patient in *Tarasoff II* had an acknowledged privacy interest in his communications to his therapist,[37] the court found that the public safety interest was more important.[38] The court viewed the need for

30. These last three factors are a part of the public policy reasons for imposing the duty. *See* discussion *infra* notes 38-41 and accompanying text.

31. *See* discussion on malpractice, including the insurance factor, *infra* Part III.C.

32. *Tarasoff II*, 551 P.2d at 342.

33. *Id.*

34. *Id.* at 345.

35. *Id.* (stating, in addition, that "best judgment" is sufficient). Justice Mosk dissented, objecting to the use of professional standards in predicting violence, stating that there are no professional standards and that the majority's position removes us from "the world of reality into the wonderland of clairvoyance." *Id.* at 354 (Mosk, J., concurring and dissenting).

36. *Id.* Even though Poddar did not specifically identify the victim, the court pointed out that "a moment's reflection will reveal the . . . identity;" thus, the court imposed no strict rule regarding identity. *Id.* at 345 n.11. The court admonished therapists to disclose identity information only if it "is necessary to avert danger to others, and [to] . . . do so discretely" in order to maximize patient privacy. *Id.* at 347.

37. *Id.* at 346.

38. *Id.* at 347. Referring to doctor/patient confidentiality, the court stated that "[t]he protective privilege ends where the public peril begins." *Id.* The United States Supreme Court recently created a federal "psychotherapist privilege" that protects, from compelled disclosure, confidential communications made in the course of psychotherapy between licensed psychiatrists, psychologists *and* social workers, and their patients. Jaffee v. Redmond, 116 S. Ct. 1923, 1931 (1996). The Court also indicated that it would define the new federal privilege on a case-by-case basis; however, the Court was careful to point out that it "do[es] not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist." *Id.* at 1932 n.19. Missouri courts have also favored the public policy position, imposing a duty to warn and weighing factors similar to those in *Tarasoff II* when determining whether there is a duty. Bradley v. Ray, 904 S.W.2d 302, 310 (Mo. Ct.

societal protection as essential in the modern world;[39] the risk of unnecessary warnings was "a reasonable price to pay for the lives of possible victims that may be saved."[40] Therefore, the court concluded that "[t]he protective privilege ends where the public peril begins."[41]

2. *Discharging the Duty*

A therapist is under a duty of reasonable care both in determining dangerousness and in protecting potential victims from that danger.[42] In carrying out the duty to protect, the therapist's range of options includes warning the victim or someone close to the victim, contacting the police, or "tak[ing] whatever other steps are reasonably necessary under the circumstances."[43] This ambiguous statement of "whatever steps are reasonably necessary,"[44] among other ambiguities, has led to court decisions and statutes that narrow the options within the *Tarasoff* doctrine.[45]

B. *Refining the Tarasoff Doctrine Through Case Law and Statutes*

Most jurisdictions have adopted the *Tarasoff II* duty in one form or another.[46] Confusion regarding the exact requirements of this duty and

App. 1995) (finding that the public policy of Missouri favors imposing a duty to warn on psychologists). Discussing *Tarasoff II*, one commentator argued that protecting the victim's constitutional right to life, liberty, and property was the court's rationale and that it outweighed the doctor/patient privilege. Jonathan Baumoel, *The Beginning of the End for the Psychotherapist-Patient Privilege*, 60 U. CIN. L. REV. 797, 818 (1992).

39. *Tarasoff II*, 551 P.2d at 347. Specifically, the court stated that "[i]n this risk-infested society we can hardly tolerate the further exposure to danger that would result from a concealed knowledge of the therapist that his patient was lethal." *Id.*

40. *Id.* at 346.

41. *Id.* at 347. The Fourth Circuit has pointed out that "[t]he duty to warn is an expression of humanitarianism and the spirit of the Good Samaritan." Currie v. United States, 836 F.2d 209, 213 (4th Cir. 1987). One commentator has pointed out that "the court merely codified what had been required for some time by the ethical standards of the therapeutic profession itself." Mangalmurti, *supra* note 19, at 404.

42. *Tarasoff II*, 551 P.2d at 345. The duty is that "once a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger." *Id.*; *see also* Geske, *supra* note 19, at 392-94 (discussing the duty).

43. *Tarasoff II*, 551 P.2d at 340.

44. Leslie B. Small, *Psychotherapists' Duty to Warn: Ten Years After* Tarasoff, 15 GOLDEN GATE U. L. REV. 271, 291 (1985) (examining *Tarasoff* and its progeny and establishing that there is a need for statutory guidance).

45. *See* discussion *infra* Part II.B.

46. Lake, *supra* note 2. *See also* Paul S. Appelbaum et al., *Statutory Approaches to Limiting Psychiatrists' Liability for Their Patient's Violent Acts*, 146 AM. J. PSYCHIATRY

which jurisdictions will enforce it continues to plague therapists.[47] Begin-

821, 822 (1989) (recognizing that most therapists believe that they have a duty to protect, and recommending reforms that would clarify that duty).

47. J. T. Melella et al., *The Psychotherapist's Third-Party Liability for Sexual Assaults Committed By His Patients*, 15 J. PSYCHIATRY & L. 83, 99 (1987) (a discussion on treatment of sex offenders and therapists' legal liability). *See also* Salter, *supra* note 10, at 150-51 (pointing out that *Tarasoff II* and *McIntosh v. Milano*, 403 A.2d 500 (N.J. Super. Ct. Law Div. 1979) (a case with similar facts and holding to *Tarasoff II*) "established that psychotherapists owe a duty to third parties in [those] jurisdictions, [but that] the scope of that duty is unclear"). Several states have adopted, in some form and with varied standards, the duty to warn in the context of psychotherapy: ARIZ. REV. STAT. ANN. § 36-517.02 (West 1993) (explicit threat of immediate serious harm or death to a clearly identified or identifiable victim); CAL. CIV. CODE § 43.92 (West 1996) (serious threat of physical violence against a reasonably identifiable victim); Thompson v. County of Alameda, 614 P.2d 728, 738 (Cal. 1980) (duty to warn if "predictable threat of harm to a named or readily identifiable victim or group of victims who can be effectively warned of the danger."); COLO. REV. STAT. ANN. § 13-21-117 (West 1987) (serious threat of immediate physical violence against specific person(s)); Perreira v. State, 768 P.2d 1198, 1210 n.8 (Colo. 1989) (recognizing the Colorado statute which outlines the duty to warn); Almonte v. New York Med. College, 851 F. Supp. 34, 40-41 (D. Conn. 1994) (duty to warn when specific threat is made against specific group of victims); DEL. CODE ANN. tit. 16, § 5402 (1995) (explicit and imminent threat to kill or seriously injure a clearly identified victim); Naidu v. Laird, 539 A.2d 1064, 1073 (Del. 1988) (duty extends when there is an unreasonable danger to potential victims or to classes of potential victims that are identifiable); FLA. STAT. ANN. § 455.2415 (West Supp. 1996) (actual threat against an identifiable victim); Bradley Ctr., Inc. v. Wessner, 296 S.E.2d 693, 695-96 (Ga. 1982) (recognizing duty to warn and duty to control hospital patient when patient is likely to cause harm to others); IDAHO CODE §§ 6-1902, 6-1903 (1996)(explicit threat of immediate serious harm or death to a clearly identified or identifiable victim); IND. CODE ANN. § 34-4-12.4-2 (Michie 1996) (actual threat of physical violence or other means of harm against a reasonably identifiable victim); Boulanger v. Pol, 900 P.2d 823, 835 (Kan. 1995)(recognizing a duty to warn, but finding that it does not apply when the victim already knew of the danger); KY. REV. STAT. ANN. § 202A.400 (Michie 1991) (actual threat of physical violence against a clearly identified or reasonably identifiable victim or actual threat of some specific violent act); Evans v. Morehead Clinic, 749 S.W.2d 696, 699 (Ky. Ct. App. 1988)(serious risk of violence against a reasonably foreseeable victim, *i.e.*, specifically identifiable or readily identifiable); LA. REV. STAT. ANN. § 9:2800.2 (West 1991 & Supp. 1995)(threat of physical violence against a clearly identified victim); Bardoni v. Kim, 390 N.W.2d 218, 221 (Mich. Ct. App. 1986) (duty to warn arises if patient poses serious danger of violence to readily identifiable victim); MINN. STAT. ANN. § 148.975(1)(e) (West 1989) (specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim); Bradley v. Ray, 904 S.W.2d 302, 311 (Mo. Ct. App. 1995) (specific risk of future harm to a readily identifiable victim); MONT. CODE ANN. § 27-1-1102 (1995) (actual threat of physical violence by specific means against a clearly identified or reasonably identifiable victim); NEB. REV. STAT. § 71-1, 206.30 (Supp. 1994) (serious threat of physical violence against a reasonably identifiable victim); Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193 (D. Neb. 1980) (duty to take precautions, including warnings, to protect potential victims of a patient who poses an unreasonable risk of harm to others); N.H. REV. STAT. ANN. §§ 329:31, 330-A:22 (1995) (serious threat of physical violence against a clearly identified or reasonably identifiable victim or serious threat of substantial damage to real property); N.J. STAT. ANN. § 2A:62A-16.b

ning with the case of *Thompson v. County of Alameda*,[48] courts have attempted to refine the *Tarasoff* doctrine. In *Thompson*, a juvenile delinquent was released from county institutional custody and subsequently murdered a child.[49] The court held that "the duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim."[50] In this case, the threats made by the juvenile delinquent were generalized,[51] and the court declined to create an affirmative duty to warn such a "large amorphous public group of potential targets."[52] Other courts have followed *Thompson's* lead by requiring specific threats against readily identifiable victims before a duty arises.[53]

(West 1996) (threat of imminent, serious, physical violence against a readily identifiable individual or against himself); McIntosh v. Milano, 403 A.2d 500, 511-12 (N.J. Super. 1979) (duty to "take whatever steps are reasonably necessary" when a patient manifests identifiable dangerousness toward an intended or potential victim(s)); Littleton v. Good Samaritan Hosp. & Health Ctr., 529 N.E.2d 449, 455 (Ohio 1988) (duty to protect a person through reasonable precautions from the violent propensities of the psychiatrist's patient within the inpatient setting); UTAH CODE ANN. § 78-14a-102 (1992) (actual threat of physical violence against a clearly identified or reasonably identifiable victim); Peck v. Counseling Serv., 499 A.2d 422, 425-26 (Vt. 1985) (duty to warn when patient poses serious risk of danger against a readily identifiable victim); WASH. REV. CODE ANN. § 71.05.120(2) (West 1992) (actual threat of physical violence against a reasonably identifiable victim); Peterson v. State, 671 P.2d 230, 237 (Wash. 1983)(en banc) (duty to protect from danger foreseeable victims); Schuster v. Altenberg, 424 N.W.2d 159, 165 (Wis. 1988) (duty to warn applies when it is "foreseeable that an act or omission to act may cause harm to someone," and duty is not limited to a readily identifiable victim). Other jurisdictions have not yet imposed a duty to warn, but there are indications that they would do so under the proper circumstances: Morton v. Prescott, 564 So.2d 913, 916 (Ala. 1990) (duty to warn would apply only "[o]nce these specific threats are verbalized, [because] then the possibility of harm to third persons becomes foreseeable and the psychiatrist's duty arises"); Eckhardt v. Kirts, 534 N.E.2d 1339, 1344 (Ill. App. Ct. 1989) (duty to warn will apply only if there is a specific threat against a specific person); Leonard v. Latrobe Area Hosp., 625 A.2d 1228, 1232 (Pa. Super. Ct. 1993) (duty to warn will apply only if there is a threat against a specific person); Kerrville State Hosp. v. Clark, 900 S.W.2d 425, 436 n.13 (Tex. Ct. App. 1995) (noting that the duty to warn of threats by patient who poses danger of violence to others can be imposed without a specifically identified victim), *rev'd on other grounds*, 923 S.W.2d 582 (Tex. 1996); White v. United States, 780 F.2d 97, 101 (D.C. Cir. 1986) (duty to warn will apply if patient presents "'serious danger of violence' to a 'foreseeable victim'").

48. 614 P.2d 728 (Cal. 1980).

49. *Id.* at 730.

50. *Id.* at 738.

51. The patient "indicated that he would, if released, take the life of a young child . . . in the neighborhood." *Id.* at 730.

52. *Id.* at 738. The court reasoned that such a warning would involve much time and use of limited resources with unlikely benefits. *Id.* at 737.

53. *See* Bradley v. Ray, 904 S.W.2d 302 (Mo. Ct. App. 1995) (right to sue only if a therapist fails to warn of specific risks of future harm to readily identifiable victims); Leonard v. Latrobe Area Hosp., 625 A.2d 1228 (Pa. Super. Ct. 1993) (construing *Tarasoff II* as applying only in cases with a specific threat to a specific person, and finding no duty in this

Although most cases do require that the patient identify specific victims before the duty to protect will arise,[54] other cases have extended the duty to cover unidentified victims. One such case is *Lipari v. Sears, Roebuck and Co.*,[55] in which a former psychiatric patient entered a nightclub, opened fire, wounded the plaintiff, and killed the plaintiff's husband.[56]

The court found that the facts that would discharge the duty to protect vary depending on the circumstances; a warning by itself, might not be sufficient to protect a therapist from liability.[57] In addition, the court extended the duty to foreseeable victims, or even more vaguely, "a class of persons of which the [victim was a] member."[58] One commentator pointed out that "[t]hus began two traditions of *Tarasoff* duty, one following *Thompson* and one following *Lipari*."[59] Although most courts follow one line of *Tarasoff* based cases or the other,[60] not all courts follow the *Tarasoff* case or any of its progeny.[61]

Among courts that recognize the duty, additional confusion centers on whether the courts should employ an objective or a subjective approach. Many courts rely on an objective standard, which requires therapists to predict dangerousness based on the standard of care of the medical community.[62] The objective standard has been widely criticized in commen-

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case because there was no specific threat); Peck v. Counseling Serv. of Addison County, Inc., 499 A.2d 422 (Vt. 1985) (finding a duty to warn readily identifiable victims); Bardoni v. Kim, 390 N.W.2d 218 (Mich. Ct. App. 1986) (holding that the duty to protect arises only if there is an identifiable third person).

54. Mangalmurti, *supra* note 19, at 384.

55. 497 F. Supp. 185 (D. Neb. 1980).

56. *Id.* at 187.

57. *Id.* at 193. *See also* Jablonski by Pahls v. United States, 712 F.2d 391, 398 (9th Cir. 1983) (finding that a warning, especially one that is "unspecific and inadequate under the circumstances," could still subject a therapist to liability for harm done by his patient).

58. *Jablonski by Pahls*, 712 F.2d at 194-95. *See also* Schuster v. Altenberg, 424 N.W.2d 159, 164-65 (Wis. 1988) (finding that "the duty to warn or to institute commitment proceedings is not limited by a requirement that threats made be directed to an identifiable target," and can be imposed even if an unforeseeable plaintiff is involved); Hamman v. County of Maricopa, 775 P.2d 1122, 1128 (Ariz. 1989) (imposing a duty on therapists to warn any foreseeable victim who is "within the zone of danger, that is, subject to probable risk of the patient's violent conduct").

59. Lance C. Egley, *Defining the* Tarasoff *Duty*, 19 J. PSYCHIATRY & L. 99, 106 (1991) (reviewing statutes and cases, and pointing out the need for definition of the components of the *Tarasoff* duty).

60. *Id.*

61. *See* Boyton v. Burglass, 590 So. 2d 446 (Fla. Dist. Ct. App. 1991) (holding that there is no duty to warn because no special relationship exists).

62. *See, e.g.*, *Tarasoff II*, 551 P.2d at 340 (judging by the standard of the profession); *Lipari*, 497 F. Supp. at 193-94 (judging by the standard of care of the therapeutic community); *Bardoni*, 390 N.W.2d at 222 (judging by the standard of the profession).

tary, and to a lesser extent in cases.[63] This criticism has led to the development of a subjective standard, which requires that an actual threat be made before the duty will be imposed.[64]

Due to the confusing and conflicting case law handed down over the years, "[a] consensus is developing on the preference of [using] a legislative approach" to clarify the laws.[65] Commentators argue that the legislature is better equipped to further develop the law in this area.[66] Unfortunately, there are still variations in the legislation between the jurisdictions regarding origination of the duty, discharge of the duty, protections for clinicians, and exclusions.[67]

Most state statutes require an actual or serious threat;[68] thus, therapists in these jurisdictions no longer have to attempt to predict dangerousness. This constitutes an effective response by the legislatures to *Tarasoff II's* ambiguous "should have known" standard.[69] The actual threat requirement creates a preferable bright-line test that recognizes the inherent difficulties in predicting dangerousness.[70]

Victim identification is also addressed in the statutes. The majority of jurisdictions require that the victims be identified or identifiable.[71] Juris-

63. Salter, *supra* note 10, at 149, 151, 157-59. *See also*, Egley *supra* note 59, at 105; *Tarasoff II*, 551 P.2d at 354 (Mosk, J., concurring and dissenting).

64. *See, e.g.*, *Tarasoff II*, 551 P.2d at 354 (Mosk, J., dissenting)(questioning whether professional standards exist and concluding that a duty to warn should arise only if the therapist actually predicts violence; to do otherwise is to enter the "wonderland of clairvoyance"); Brady v. Hopper, 570 F. Supp. 1333, 1338 (D. Colo. 1983) (stating that "[u]nless a patient makes specific threats, the possibility that he may inflict injury on another is vague, speculative, and a matter of conjecture. However, once the patient verbalizes his intentions . . . the possibility of harm to third persons becomes foreseeable" and the duty arises). *See also* discussion of statutes *infra* notes 68-70 and accompanying text.

65. Felthous, *supra* note 3, at 590.

66. *See id.* (stating that although there are variations among the statutes in different jurisdictions, "public policy can be more clearly established by legislatures than by the courts"). *See also* Salter, *supra* note 10, at 161 (pointing out that the legislature can best discover the needs of society, patients, and therapists).

67. Appelbaum et al., *supra* note 46, at 823 (analyzing statutes from California, Colorado, Indiana, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, New Hampshire, Ohio, Utah, and Washington). *See also* Egley, *supra* note 59 (surveying statutes and cases involving the duty to protect); Geske, *supra* note 19 (analyzing cases and statutes imposing a duty to protect).

68. *See, e.g.*, CAL. CIVIL CODE § 43.92(a) (West 1996); COLO. REV. STAT. ANN. § 13-21-117 (West 1987).

69. Appelbaum et al., *supra* note 46, at 823. The *Tarasoff II* standard is subjective, rather than objective.

70. *Id.*

71. *See, e.g.*, CAL. CIVIL CODE § 43.92(a) (West 1996); WASH. REV. CODE ANN. § 71.05.120(2) (West 1992).

dictions like Kentucky and Indiana, however, have enacted vague statutes that impose liability for a therapist's failure to warn even though the victims had not been identified.[72]

While the duty to protect can be discharged in a variety of ways, warning the victim, the police, or both is the most popular choice.[73] Other options for discharging the duty include attempted commitment to an institution, voluntary hospitalization, or a number of other "reasonable" steps.[74] Although states have developed differing priorities and requirements regarding the duty to protect, their statutes at the very least "define limits to the circumstances of liability which are both more specific and more narrow than the circumstances of liability under the *Tarasoff* line of cases."[75] One commentator has noted, however, that the

> [d]ifferences in facts of individual cases and differences in state statutes may contribute to differences in court decisions. It can be argued that in a pluralistic, democratic society that gives expression to competing interests, differences of opinion are desirable on the highest levels. Unlike a totalitarian society, where uniform law is determined by the single controlling party . . . nonetheless, with regard to the duty to warn or protect, it is now clear that courts have fundamentally different constructions of common law. Inconsistencies in legal theory are not desirable for a legal duty to protect.[76]

On a positive note, predictability of the law is obtainable through statutory construction, and if the laws become more predictable, then the result could be a stabilization of therapists' ever-increasing insurance rates.[77] Even so, new ambiguities regarding medical malpractice and professional, as opposed to personal, liability of therapists are creating new doubts and concerns in this area of the law.

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72. KY. REV. STAT. ANN. § 202A.400(1)-(2) (Michie 1991); KY. REV. STAT. ANN. § 645.270(l)-(2) (Michie 1995); IND. CODE ANN. § 34-4-12.4-2 (Michie Supp. 1996).

73. *See, e.g.*, CAL. CIVIL CODE § 43.92(b) (West 1996) (therapist must warn both the victim and the police); LA. REV. STAT. ANN. § 9:2800.2 (West 1991 & Supp. 1995) (therapist must warn both the victim and the police); MINN. STAT. ANN. § 148.975(1)(e) (West 1989) (therapist must warn either the victim or the police).

74. *See, e.g.*, IND. CODE ANN. § 34-4-12.4-3 (Michie Supp. 1996) (duty discharged if therapist seeks civil commitment of the patient or takes other reasonable steps necessary to prevent violence); KY. REV. STAT. ANN. § 34-4-12.4-3 (Michie 1996) (duty discharged if therapist seeks civil commitment of the patient or takes other reasonable steps necessary to prevent violence).

75. Geske, *supra* note 19, at 415.

76. Felthous, *supra* note 3, at 588-89.

77. Geske, *supra* note 19, at 415.

III. Analyzing the Malpractice Cases

A new uncertainty regarding therapist liability has arisen in the context of the *Tarasoff II* duty to protect. Courts are divided over whether a breach of the duty to protect constitutes malpractice; some courts have found a single duty to protect with "inextricable" subparts,[78] while other courts have found two independent duties within the overall duty to protect.[79] In addition, statutory construction has led to a split in authorities because a breach of the duty constitutes malpractice in some jurisdictions,[80] and ordinary negligence in others.[81]

The *Tarasoff II* court held that "[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."[82] In *Tarasoff II*, one of the factors required in order to find the duty was "the availability, cost and prevalence of insurance for the risk involved."[83] These portions of *Tarasoff II* are essential to any examination of the cases dealing with the malpractice issue. Although *Tarasoff II* is binding only in California, the court's reasoning should lead to application of this decision in the malpractice context.

A. *Duty to Protect: Inextricable Subparts and Professional Negligence for Breach of the Duty*

In *Hedlund v. Superior Court of Orange County*,[84] the California Supreme Court confronted the issue of whether failure to warn constitutes "professional negligence" or ordinary negligence.[85] In this case, two psychologists were sued by a mother and son for malpractice after their patient shot and seriously injured the mother in the presence of her minor son.[86] The patient had expressed his intentions to harm the plaintiff

78. *See* Hedlund v. Superior Court of Orange Cty., 669 P.2d 41 (Cal. 1983).

79. *See* Hutchinson v. Patel, 637 So. 2d 415 (La. 1994).

80. *See, e.g., Hedlund*, 669 P.2d at 45-46; Wilschinsky v. Medina, 775 P.2d 713, 719-20 (N.M. 1989).

81. *See, e.g., Hutchinson*, 637 So. 2d at 428; Midtown Community Mental Health Ctr. v. Gahl, 540 N.E.2d 1259, 1261 (Ind. Ct. App. 1989), *cert. denied*, 106 S. Ct. 1386 (1989).

82. *Tarasoff II*, 551 P.2d at 340.

83. *Id.* at 342. This is a very important consideration when facing the possibility of personal, rather than professional, liability. *See infra* notes 138-44 and accompanying text.

84. 669 P.2d 41 (Cal. 1983).

85. *Id.* at 42. The court was called upon to see if the statute of limitations had run out on plaintiff's cause of action, which led to this issue. *Id.*

86. *Id.* at 43.

mother to the psychologists, yet the doctors did not warn anyone of the danger.[87]

The *Hedlund* court began its analysis by discussing the applicable California statute that defined professional negligence as "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death."[88] Based on the statute, the court found that the duty to protect consists of a duty to diagnose dangerousness and a duty to warn the threatened third party.[89]

The court observed that "[t]he warning aspect of this duty . . . is inextricably interwoven with the diagnostic function."[90] The court unequivocally ruled that "[t]he diagnosis and the appropriate steps necessary to protect the victim are not separate or severable, but together constitute the duty giving rise to the cause of action" and that both involve professional judgment.[91] The court concluded that the plaintiff had a cause of action for professional negligence, and that this finding was within the purpose of California's Medical Malpractice Act.[92] The court pointed out that the legislature's stated purpose was

> "to provide an adequate and reasonable remedy" for the "major health care crisis . . . attributable to skyrocketing malpractice premium[s] . . . resulting in a potential breakdown of the health delivery system, severe hardships for the medically indigent, a denial of access for the economically marginal, and depletion of physicians such as to substantially worsen the quality of health care available."[93]

Obviously, as the court mentioned, if the therapist's professional negligence harms third parties, then the Medical Malpractice Act's goal of reducing monetary judgments in these types of actions would be frustrated if the court were to decide that the Act does not apply.[94] The court further reasoned that "[i]t would be anomalous . . . if a third party's cause of

87. *Id.*

88. *Id.* at 42 n.2 (citing CAL. CIV. PROC. CODE § 340.5(2) (West 1992)).

89. *Id.* at 45.

90. *Id.* One commentator aptly summarized the court's reasoning, stating "that the implementation of adequate means to protect an intended victim is as much a component of a psychotherapist's duty as is the diagnosis of patient violence; both facets involved the rendering of professional services." Small, *supra* note 44, at 288.

91. *Hedlund*, 669 P.2d at 45.

92. *Id.* at 45-46.

93. *Id.* at 45 (citing CAL. CIV. PROC. CODE § 340.5(2)).

94. *Id.* at 45-46.

action . . . were treated differently than an action by the patient."[95]

In *Wilschinsky v. Medina*,[96] the New Mexico Supreme Court reached similar conclusions regarding professional negligence and the duty to protect. The court found that the New Mexico Medical Malpractice Act ("NMMMA")[97] was applicable when a third party sued a doctor for professional negligence.[98]

The court cited the legislature's definition of malpractice which "'includes any cause of action . . . against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient.'"[99] The NMMMA, like the California Medical Malpractice Act, was designed to cope with the health care crisis and "to promote health care . . . by providing a framework for tort liability with which the insurance industry could operate."[100] The court indicated that the legislature clearly intended to have malpractice insurance "available to health care providers."[101] In addition, the court found that an "unreasonable classification would result" if a third party could receive full monetary recovery from the doctor's negligence while actual patients of the doctor would be limited in their recovery because of the caps on judgments that the NMMMA imposes.[102] Thus, although the NMMMA specified injury to the patient in its definition, the court found that in the interest of justice and to meet the legislative intent, third party claims must also be covered by the NMMMA.[103]

Not all courts[104] have been able to reach the rational conclusions found in the above two cases. Statutory construction and interpretation have prevented courts from finding a malpractice cause of action for breaches

95. *Id.* at 46.

96. 775 P.2d 713 (N.M. 1989).

97. N.M. STAT. ANN. § 41-5 (Michie 1996).

98. *Wilschinsky*, 775 P.2d at 720. The doctor medicated a patient and allowed her to leave his office. She then drove her car and caused an accident, injuring the plaintiff. *Id.* at 714. The court found that the doctor had a duty to the driving public and that he breached that duty. *Id.* at 717.

99. *Id.* at 718 (citing N.M. STAT. ANN. § 41-5-3(c)).

100. *Id.* at 718 (citing N.M. STAT. ANN. § 41-5-2).

101. *Id.* at 719 (citing N.M. STAT. ANN. § 41-5-3(c)).

102. *Id.* Some states impose caps on medical malpractice liability. *See, e.g.*, N.M. STAT. ANN. § 41-5-6 (Michie 1996) (limiting plaintiff recovery to $600,000 and limiting a health care provider's personal liability to $200,000).

103. 775 P.2d at 719-20.

104. Hutchinson v. Patel, 637 So. 2d 415 (La. 1994); Midtown Community Mental Health Ctr. v. Gahl, 540 N.E.2d 1259 (Ind. Ct. App. 1989), *cert. denied*, 106 S. Ct. 1386 (1989).

of the duty to protect.[105]

B. Duty to Protect: Two Independent Duties and Ordinary Negligence for Breach of the Duty

In *Hutchinson v. Patel*,[106] the Louisiana Supreme Court also confronted the issue of whether a psychiatrist's failure to warn or take reasonable precautions to protect third parties constitutes malpractice.[107] In that case, a patient voluntarily entered a psychiatric hospital and was placed under the care of the defendant psychiatrist, Dr. Patel.[108] The patient was released a short time later and subsequently shot the plaintiff, who is now permanently disabled.[109] Rejecting the well-reasoned decisions in *Wilschinsky* and *Hedlund*,[110] the court held that the plaintiff's claim was not covered by the Louisiana Medical Malpractice Act ("LMMA").[111]

The LMMA has the same purpose as the California and New Mexico acts; it is designed "to reduce or stabilize medical malpractice insurance rates and to assure the availability of affordable medical services to the public."[112] The court observed that the LMMA protects health care providers by limiting the amount a plaintiff can recover through statutory

105. *Hutchinson*, 637 So. 2d at 428; *Gahl*, 540 N.E.2d at 1262.

106. 637 So. 2d 415 (La. 1994).

107. *Id.* at 415. Louisiana recognizes the *Tarasoff* doctrine. It is codified at LA. REV. STAT. ANN. § 9:2800.2 (West 1991 & Supp. 1995):

> A. When a patient has communicated a threat of physical violence, which is deemed to be significant in the clinical judgment of the treating [therapist] . . . against a clearly identified victim or victims, coupled with the apparent intent . . . to carry out such threat, the [therapist] . . . treating such patient and exercising reasonable professional judgment, shall not be liable for a breach of confidentiality for warning of such threat or taking precautions to provide protection from the patient's violent behavior.
>
> B. A [therapist]'s . . . duty to warn or to take reasonable precautions . . . shall be discharged . . . if he makes a reasonable effort to communicate the threat to the potential victim or victims and to notify law enforcement authorities in the vicinity of the patient's or potential victim's residence.

108. *Hutchinson*, 637 So. 2d at 418.

109. *Id.*

110. *Id.* at 423-25. The Louisiana court was limited in its ruling by the statutory construction, but it also interpreted the duty differently. *Id.* at 420-24.

111. *Hutchinson*, 637 So. 2d at 418; LA. REV. STAT. ANN. § 40:1299.41 (West 1992 & Supp. 1996). Dr. Patel sought the dismissal of Hutchinson's cause of action because the Medical Malpractice Act requires that a medical review panel assess the case before a civil action is filed. *Hutchinson*, 637 So. 2d at 418.

112. *Hutchinson*, 637 So. 2d at 419.

caps on judgments, and by limiting the volume of formal litigation.[113]

The Louisiana legislature defines malpractice as "any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient."[114] Dr. Patel[115] argued to the court that excluding these types of claims from coverage under the LMMA would contravene the "Act's purpose of guaranteeing insurance coverage for health care providers."[116] He went on to explain that if the claim does not constitute malpractice, then malpractice insurance would not be available to compensate the doctor for any judgments that might be rendered against him.[117] Similarly, the comprehensive general liability ("CGL") coverage[118] probably would not cover a *Tarasoff* claim because CGL regularly "exclude[s] coverage of claims arising from the rendering or failure to render professional services."[119] Consequently, the therapist would be left without any insurance coverage.[120] In spite of all of the defendant's valid arguments regarding the realities of insurance coverage and the court's observations about the purposes of the LMMA, the court dismissed these arguments as "speculative."[121]

The court rejected Dr. Patel's argument, which was based on *Hedlund*, that the duty to warn is inextricably interwoven with the diagnostic function of finding the patient to be dangerous.[122] Instead, the court decided that the duty to warn requires only reasonable care; therefore, it is independent from the therapist's duty to diagnose dangerousness, which requires a professional standard of care and is owed to the patient

113. *Id.*

114. LA. REV. STAT. ANN. § 40:1299.41.A(8) (West 1992 & Supp. 1996). Note the similarity between Louisiana's definitions and New Mexico's definitions, *supra* note 99 and supporting text.

115. Defendant Patel is joined by the Louisiana Psychiatric Association and the Louisiana State Medical Society as amici curiae. *Hutchinson*, 637 So. 2d at 422.

116. *Id.* at 422.

117. *Id.* at 423.

118. CGL is a form of insurance that covers the "non-professional risks associated with a therapist's practice." *Id.*

119. *Id.* (Although the court decides that it is not professional negligence, the insurance company may still classify it as a professional service because it is rendered by the therapist as part of his practice.).

120. *Id.*

121. *Id.* at 424. In a concurring opinion, Justice Hall asserts that insurance matters should be litigated later, when the policy provisions can be reviewed. *Id.* at 429 (Hall, J., concurring). Such a proposal would not, however, reduce the volume of litigation or limit litigation related costs.

122. *Id.* at 424.

alone.[123] The court found: (1) there was not a contract between a third party and the doctor, which is required under traditional malpractice claims, and (2) there were no professional services rendered to the nonpatient tort victim. Thus, the court concluded that the LMMA could not apply to a third party claim.[124]

The *Hutchinson* court also discussed the need to control health care costs, stating that "[s]urely the legislature did not intend to control the rising costs of medical services by limiting health care providers' liability for *acts unrelated to the provision of medical services* . . . . [I]nterpreting 'malpractice' to include claims arising from injuries to . . . a non-patient would not promote the purpose of the Act."[125] Ironically, the court characterized Dr. Patel's breach of the duty to warn as an unintentional tort, which although not actionable as malpractice, "may proceed in district court as an ordinary negligence action."[126] Thus, the plaintiff could sue for more money because the cause of action was ordinary negligence and not professional negligence.

The Louisiana court failed to recognize that subjecting a therapist to personal liability for a duty required of therapists only in the exercise of their practice will not make health care more affordable. The construction of the statute, limiting malpractice to patient services only and excluding all third party claims, is contrary to the purpose behind the legislation.[127]

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123. *Id. But see* discussion regarding the standard of care *infra* notes 149-58 and accompanying text. In addition, the *Tarasoff* court based the duty to protect on the fact that there is a special relationship between a therapist and patient. *Tarasoff II*, 551 P.2d at 343. The RESTATEMENT (SECOND) OF TORTS, section 314(a) states that without a special relationship, there is no duty. If the duty to warn is not a part of professional judgment, then it is even more questionable whether a duty exists at all. Courts and commentators have criticized the existence of a duty between therapists and outpatients over whom they do not have control. *See, e.g., Hasenei*, 541 F. Supp. at 1009 (holding that a psychiatrist had no right to control an outpatient's behavior, and thus, had no duty); *Boyton*, 590 So. 2d at 449 (holding that a psychiatrist had no right to control an outpatient's behavior, and thus, had no duty); Stone, *supra* note 9, at 366 (stating that "the therapist seeing an outpatient in a clinic or office has no control over the patient").

124. *Hutchinson*, 637 So. 2d at 428. *But see Wilschinsky*, 775 P.2d at 719-20, which held that the medical malpractice act covered third parties even though the wording of the statute appeared to restrict claims to the patients themselves. *See* discussion *supra* note 111 and accompanying text.

125. *Hutchinson*, 637 So. 2d at 422 (emphasis added). It is difficult to fathom how a duty to warn is "unrelated to medical services." *See* discussion of the type of medical services offered by therapists *infra* notes 145-53; 168-71 and accompanying text.

126. *Hutchinson*, 637 So. 2d at 420.

127. This is precisely why the New Mexico Supreme Court went beyond the wording of its statute. *See* discussion of *Wilschinsky supra* notes 96-103 and accompanying text.

Unfortunately, Louisiana is not the only state moving in this direction. The Indiana Court of Appeals, in *Midtown Community Mental Health Center v. Gahl*,[128] held that the Indiana Medical Malpractice Act ("IMMA") was not applicable to a negligence cause of action raised by someone other than a health care provider's patient.[129] The court found, understandably, that the IMMA does not apply to every case naming a health care provider as a defendant.[130] The court decided, however, that the IMMA does not apply to failure to warn a nonpatient of danger because it is not "so intertwined [with rendering services] that it falls within [its] purview."[131] The Indiana court, like the Louisiana court, acknowledged that the plaintiff had a valid ordinary negligence claim against the defendant hospital.[132]

Fortunately, the dissent recognized the logic of the *Hedlund* decision and argued that a failure to protect a potential victim after diagnosing a patient as dangerous can be professional negligence.[133] The dissent contended that the IMMA should cover both the treatment of the patient and the duty to warn victims of danger.[134] In addition, the dissent recognized the inherent unfairness in allowing a nonpatient to recover more than a patient for the therapist's failure to provide proper care.[135] Thus, the dissent would have dismissed the case because the duty to warn is

128. 540 N.E.2d 1259 (Ind. Ct. App. 1989), *cert. denied*, 106 S. Ct. 1386 (1989). In this case, a former patient of the defendant hospital killed probation officer Gahl. Gahl's estate sued the hospital on the grounds that "defendants were negligent in their care of [the patient] and that the defendants' failure to warn Gahl . . . caused [his] death." *Id.* at 1260. The defendant in this case, as in *Hutchinson*, argued that the suit should be dismissed until reviewed by a medical review panel. *Id.*

129. *Gahl*, 540 N.E.2d at 1261-62. IND. CODE ANN. § 16-9.5-1-1(h) (West 1989)(repealed 1993)(defining malpractice as "any tort . . . based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient"). It should be noted that the new provision, IND. CODE ANN. § 27-12-2-18 (West 1994 & Supp. 1995), defines malpractice in almost identical terms.

130. The court gives as an example a case where the plaintiff sues because of the defendant's negligence in the maintenance of its facility. 540 N.E.2d at 1260. The example given is a far cry from the negligence in failing to warn.

131. *Id.* at 1262.

132. The court in *Gahl*, like the *Hutchinson* court, inferred that its holding would meet the act's purpose of "preserv[ing] health care services and thereby protect[ing] the public health and well being of the community." *Id.* at 1260.

133. *Id.* at 1263 (Hoffman, J., dissenting) (citing *Hedlund*, 669 P.2d at 45-46).

134. *Id.*

135. *Id.* at 1262-63. Interestingly, the dissent is citing to the Louisiana case of Thomas v. LeJeune, Inc., 501 So. 2d 1075 (La. Ct. App. 1987) which was overruled by *Hutchinson*. *LeJeune* had held that any patient or nonpatient lawsuits claiming medical malpractice had to first go through the medical review panel process. *Id.* at 1077.

"derived from the medical diagnosis and care given to a patient," invoking the medical review panel requirement of the IMMA.[136]

C. Ordinary Negligence Liability v. Malpractice Liability

Each of the preceding court decisions and statutes address the same goals: reducing health care costs, providing malpractice insurance to health care providers, and increasing health service availability. Unfortunately, the state of the law has created a "catch-22"[137] situation with regard to achieving those goals. A duty to protect that consists of inextricably interwoven subparts falling under the medical malpractice acts may cause malpractice insurance rates to increase, and subsequently raise health care costs. On the other hand, finding a therapist personally liable by creating two independent duties could have a devastating impact on health care costs as well. Therapists will either raise their fees in an effort to compensate for substantial uninsurable risks, or they will abandon this field of practice, which will cause increased health care costs due to scarcity of providers.[138] Two public interests are served by decreasing monetary judgments against therapists through caps set by malpractice statutes: (1) availability of a functional health care system with adequate numbers of doctors for all citizens, and (2) reasonable recoveries for those harmed by malpractice.[139]

The availability of insurance to balance the risk of liability is an important goal for all jurisdictions.[140] Medical malpractice acts are designed to ensure that health care providers have insurance.[141] As the defendants in *Hutchinson* pointed out, if the courts find that the duty to warn is not malpractice, then a gap in insurance coverage will result, leaving therapists personally liable for their failure to warn and defeating the purpose of the acts.[142] The caps on recovery under the various medical malprac-

136. 540 N.E.2d at 1263.

137. Catch-22 is defined as "a situation presenting two equally undesirable alternatives." WEBSTER'S NINTH COLLEGIATE DICTIONARY 215 (1988).

138. The economic concept of supply and demand states that if supply decreases while demand remains constant or increases, price for the commodity (e.g., health care) will increase. JAMES D. GWARTNEY & RICHARD L. STROUP, MICROECONOMICS: PRIVATE AND PUBLIC CHOICE 63 (5th ed. 1992).

139. *Hedlund*, 669 P.2d at 44-45.

140. Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) ("*Tarasoff II*"); Hedlund v. Superior Court of Orange Cty., 669 P.2d 41, 45 (Cal. 1983); Wilschinsky v. Medina, 775 P.2d 713, 718 (N.M. 1989); Hutchinson v. Patel, 637 So. 2d 415, 419 (La. 1994).

141. *See, e.g.*, *Wilschinsky*, 775 P.2d at 719 (discussing N.M. STAT. ANN. sec. 41-5-2).

142. *See* discussion of the defendant's arguments *supra* notes 122-25 and accompanying text.

tice acts will help keep health care costs under control by limiting monetary judgments against therapists.[143]

Following the *Hedlund* court's logic, it is anomalous that in a suit in Louisiana or Indiana, based on the same negligent act, a third party would recover more than a patient would be eligible to receive.[144] The act of warning a third party is a part of the professional service a therapist provides.[145] The *Tarasoff II* court admitted that its opinion was vague as to whether a professional standard applied when it indicated that a therapist should "take whatever . . . steps are reasonably necessary under the circumstances" to protect potential victims.[146] This duty, however, is imposed only on the therapist and is based on the special relationship between a therapist and patient.[147] Certainly then, selecting the appropriate means under the circumstances to protect third parties from violence "will hinge on a professional determination of the most effective method. . . . What appears reasonable to a practicing therapist as a method of deterring patient violence may not appear reasonable to the man of ordinary prudence."[148]

The duty to protect actually consists of two uses of the standard of reasonable care.[149] In determining dangerousness, "the therapist must use reasonable care in applying" the standards of the professional community.[150] In addition, reasonable care must be employed by the therapist "in discharging the duty to warn or protect the potential victim."[151] Thus, although the duty to protect consists of the two uses of the duty of reasonable care, the underlying standard is that of the professional community.[152] *Tarasoff* type claims involve professional judgment and should

143. *Hedlund*, 669 P.2d at 45-46.

144. *See id.* at 46. *See also Wilschinsky*, 775 P.2d at 719 (finding that an "unreasonable classification" would result).

145. *See* Small, *supra* note 44, at 288 (discussing *Hedlund*). *But see Hutchinson*, 637 So. 2d at 422.

146. *Tarasoff II*, 551 P.2d at 340. *See also* Stephen Craig Bednar, *The Psychotherapist's Calamity: Emerging Trends in the* Tarasoff *Doctrine*, 1989 B.Y.U. L. REV. 261, 264 n.14 (discussing discharge of the duty to protect).

147. *See* discussion of special relationships *supra* notes 21-27 and accompanying text.

148. Bednar, *supra* note 146, at 264 n.14.

149. Geske, *supra* note 19, at 394.

150. *Id. See also* Mangalmurti, *supra* note 19, at 384 ("the crucial part of the *Tarasoff* doctrine is the standard that says the therapist will be held to the standards of the requisite medical community").

151. Geske, *supra* note 19, at 394.

152. *Id.*

be considered malpractice.[153]

If the failure of a therapist to meet the duty to warn or prevent harm to third parties is ordinary negligence and not malpractice,[154] then the impact on therapists could be significant. One study has found that doctors who are sued for malpractice are likely to suffer emotional distress, to discontinue treatment of dangerous patients, to discourage their children from entering the medical field, and even to retire early.[155] These reactions could become more pronounced when a therapist is faced with personal liability instead of insured malpractice liability. Now the law in some jurisdictions not only threatens the professional status and self-esteem of therapists, but it also exposes their personal savings and assets to potentially devastating tort liability.

In response to the Louisiana court's classification of the duty as ordinary negligence and imposing personal liability, one commentator has suggested ways to get around liability altogether in that state.[156] She suggests that (1) a therapist will not be liable for a failure to predict, even if the "therapist acts unreasonably in exercising professional judgment" because it is not a duty owed to third parties, and (2) "a therapist will not be liable even after an actual threat is made because the therapist can always claim that no prediction of violence was ever made."[157] If these suggestions are true reflections of reality, then the results are certainly unconscionable: they not only restrict liability, but also restrict any notion of professional ethics as well.[158]

Similar predictions of therapist reactions were made following the *Tarasoff II* decision, but fortunately the impact was not as great as was expected.[159] Unfortunately, the therapist is no longer able to rely on in-

153. *See Hedlund*, 669 P.2d at 45; *Wilschinsky*, 775 P.2d at 719; *Midtown*, 540 N.E.2d at 1262-63 (Hoffman, J., dissenting). *See also* Small, *supra* note 44, at 288.

154. *See Hutchinson*, 637 So. 2d at 420; *Midtown*, 540 N.E.2d at 1260.

155. Sara C. Charles et al., *Sued and Nonsued Physicians' Self Reported Reactions to Malpractice Litigation*, 142 AM. J. PSYCHIATRY 437 (1985). At least one commentator has found that *Tarasoff* has not impacted on the field of psychotherapy as greatly as some commentators had predicted. Mangalmurti, *supra* note 19, at 404-05 (stating that therapists "pay little heed to *Tarasoff*, and the practice of psychotherapy thrives"). At that time, however, malpractice insurance at least softened the blow, and therapists' personal assets were not threatened.

156. Liuzza, *supra* note 5, at 1026.

157. *Id.* The commentator claims that a therapist will only be liable if he commits an overt act in attempting to warn a third party, showing that he predicted the patient was dangerous and that the warning was insufficient and unreasonable. *Id.*

158. These examples clearly exhibit the need for malpractice liability in this area of the law.

159. *See, e.g.*, Mangalmurti, *supra* note 19, at 404-05 ("in the long run, *Tarasoff* is less a

surance coverage in the event of breach, as he had been able to do when those predictions were made. Under the old liability standard, a therapist's liability concerns could become so great that he would enter into the therapeutic relationship with a "wary eye toward protecting his own interests."[160] The therapist's concern for the patient would be diluted, and his "devotion to both the fiduciary duty and the therapeutic project" would be undermined.[161] These predictions may be more accurate now than they were in the past. Some jurisdictions are not willing to allow therapists such "easy outs" as were mentioned above,[162] and all jurisdictions would be wise to follow their lead.

IV. THE NEED FOR CHANGE AND CONSISTENCY

Undeniably, there continues to be confusion regarding the extent of a therapist's duty to a third party.[163] Now there is added confusion as to the type of liability that may be imposed on therapists who fail to fulfill their duty to third parties. A commentator once stated, "it appears clear that no court decision in the last generation has succeeded in so raising the anxieties of mental health professionals [as that of *Tarasoff II*];"[164] that observation was made before *Hutchinson v. Patel* became the law in Louisiana.

It is evident that consistency in the law is necessary[165] to provide therapists with notice regarding their potential liability and to help reduce health care costs nationwide. The cases and statutes that find dependent duties within the duty to protect and that allow third party malpractice claims are the best alternatives as models for change.[166] Those decisions

threat than a misplaced fear in one collective mind"); D. J. Givelber et al., Tarasoff, *Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443 (arguing that based on their survey, *Tarasoff* has not discouraged therapists from treating dangerous patients). *Hutchinson* could prove to be a more substantive threat.

160. Robert F. Schopp & David B. Wexler, *Shooting Yourself in the Foot with Due Care: Psychotherapists and Crystallized Standards of Tort Liability*, 17 J. PSYCHIATRY & L. 163, 184 (1989).

161. *Id.*

162. *See, e.g.*, *Bardoni*, 390 N.W.2d at 222 (showing that courts will scrutinize whether a therapist should have found that the patient was dangerous); Mavroudis v. Superior Ct., 102 Cal. App. 3d 594, 604-05 (1980) (showing that a therapist's duty to protect will be scrutinized through records, testimony, and even expert affidavits or testimony).

163. *See, e.g.*, Melella et al., *supra* note 47, at 110-11 (arguing in addition to this that if courts broaden liability therapists will no longer treat risky patients).

164. Appelbaum et al., *supra* note 46, at 821.

165. Felthous, *supra* note 76, at 588-89 and accompanying text.

166. *See Hedlund*, 669 P.2d at 45; *Wilschinsky*, 775 P.2d at 719; *Midtown*, 540 N.E.2d at 1262-63 (Hoffman, J., dissenting); CAL. PROC. CODE § 340.5(2) (West 1996).

are more likely to result in insurance coverage for health care providers and health care service for all.[167] Imposing personal liability on therapists will not solve the problems articulated by the courts as legislative goals.

People view doctors and therapists as professionals committed to aiding others;[168] thus, a professional therapist's failure to protect a third party should constitute malpractice.[169] In addition, a patient who actively seeks professional help recognizes that he "does not [actually] want to hurt others and feels that such desires are misguided."[170] The patient tells the therapist his thoughts because he "wants help and . . . may feel that by telling the therapist of his desires, the therapist will do what she can to stop him."[171] Thus, failure to warn should constitute malpractice because the therapist has not done all that she can to help the patient eliminate his dangerous propensities.

A therapist can help the patient break the chain of violent desires through a warning to a third party that would not only protect the third party, but would also remove the temptation of the third party from the patient's sights. If this is truly why the patient came to the therapist, then she has not fulfilled her professional duties to the patient and should be liable for malpractice to both the patient *and* the third party.

Current statutes need to be amended, making it clear that the duty to protect consists of dependent subparts and that the breach of either one of the subparts will subject therapists to professional liability to both patients and third parties. Currently, the duty to protect statutes grant therapists immunity from liability for disclosure and are an exception to the traditional rule that requires doctor-patient confidentiality.[172] In light of the developments in Louisiana and Indiana, the statutes should add a section that states unequivocally that the failure to discharge the duty to protect a third party, either by failing to predict or failing to warn, consti-

167. *See* discussion *supra* notes 140-67 and accompanying text.

168. Mangalmurti, *supra* note 19, at 402.

169. *See, e.g., Hedlund*, 669 P.2d at 45-46.

170. Mangalmurti, *supra* note 19, at 400.

171. *Id.*

172. *See, e.g.*, LA. REV. STAT. ANN. § 9:2800.2.C (West 1991 & Supp. 1995) ("No liability or cause of action shall arise against psychologist or psychiatrist based on . . . breach of confidentiality for any confidence disclosed to a third party in an effort to discharge the duty."); UTAH CODE ANN. § 78-14a-2(2) (1992) ("No cause of action arises against a therapist for . . . disclosure of confidential information, based on a therapist's communication of information to a third party in an effort to discharge his duty.").

tutes professional negligence.[173] In addition, the medical malpractice acts should reflect that professional negligence consists of any "negligent act, or omission to act, by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death."[174] Thus, the malpractice cause of action would no longer be limited only to injuries to a patient, and therapists would not face personal liability.

V. Conclusion

For almost twenty years, the courts and legislatures in jurisdictions around the United States have imposed a duty on therapists to protect third parties from dangerous patients. Unfortunately, these laws change often and do not always change for the better. Consistency definitely is needed in this area of the law. There are no perfect solutions to the problems surrounding the duty to protect; however, Louisiana's decision to impose personal liability on therapists certainly is not the answer.

Statutes and court decisions need to reflect reality: therapists are rendering a professional service when they predict their patient's dangerousness and when they subsequently warn third parties of danger. They should not be personally liable because this is not a personal duty; it is a professional duty based on the special relationship that exists between a therapist and his patient. The statutes need to state that a breach of the duty to protect constitutes malpractice and is actionable by third parties. A third party's claim should also fall under the medical malpractice acts because it is unfair for a third party to recover more than a patient for the same negligent act.

Health care affordability is a major issue in the 1990s for the government, courts, health care providers, and citizens. The laws need to protect the interests of the therapists, as well as third parties and patients. The costs of imposing personal liability on therapists could include scarcity of health care providers willing to treat dangerous patients, a resultant reduction in public safety, increased costs as therapists exit the market, and increased fees charged by those therapists brave enough to gamble their personal assets on an uninsurable risk. The cost of establishing professional liability is a potential increase in malpractice insurance

173. This amendment is particularly important because of the fact that statutes will sometimes list a number of options for discharging the duty. A therapist must then use professional judgment to determine which option is best in a particular situation. Bednar, *supra* note 146, at 264 n.14.

174. Cal. Civ. Proc. Code § 340.5(2) (West 1996).

rates, but existing caps on malpractice judgments would help keep that cost under control.

Although classifying the duty to protect as one duty, made up of "inextricable" subparts, subject only to malpractice liability, does not guarantee a solution to the health care problem, it is a more viable option than finding two duties and imposing personal rather than professional liability on therapists.

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